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No.

IN THE

Supreme Court of the United States

October Term, 1982

ALABAMA FURNITURE CO.,

Petitioner,

v.

C. KENNETH STILL, Trustee, and ULYSSES RIVERS, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether, in the absence of curative congressional action and after release of this Court's mandate in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858 (June 28, 1982), the entire Bankruptcy Reform Act of 1978 is unenforceable and must fall because it can not be administered absent the bankruptcy court jurisdiction held inoperative in *Northern Pipeline*?

2. Whether, until Congress acts further, the invalidation of the Bankruptcy Reform Act of 1978 in its entirety revives the Bankruptcy Act of 1898, as amended, to govern bankruptcy proceedings in this case and in all cases pending or filed after release of the *Northern Pipeline* mandate?

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JURISDICTION

Notice of appeal was docketed in the court of appeals on April 26, 1982. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1). This petition is filed before judgment by the Court of Appeals pursuant to Rule 18 of this Court, and 28 U.S.C. § 2101(e). Briefing in the Court of Appeals has been stayed pending resolution hereof.

OPINION BELOW

The April 14, 1982 memorandum order of the bankruptcy court is reported at *In re Ulysses Rivers, Jr.*, 8 B.C.D. 1212, 6 CBC 2d 210 (Bk. E.D. Tenn. 1982). The order of April 23, 1982 denying petitioner's motion to proceed under the provisions of the Bankruptcy Act of 1898, as amended, is unreported. They are reproduced in the Appendix hereto.

STATUTE INVOLVED

The Bankruptcy Reform Act of 1978, Pub. L. 95-598, is set forth at 92 Stat. 2549 *et seq.* Selected significant portions for the purposes hereof are reproduced in the Appendix.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

ALABAMA FUNITURE CO.,

Petitioner,

v.

C. KENNETH STILL, Trustee, and ULYSSES RIVERS, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

STATEMENT

This case presents an issue of exceptional public importance and urgency. At issue is whether, in the absence of appropriate curative congressional action, our bankruptcy system, which handles more than half a million cases per year, can continue to function effectively — or at all — after release of this Court's mandate in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S.Ct. 2858 (June 28, 1982), which invalidated the jurisdiction granted the untenured bankruptcy "courts" established by the Bankruptcy Reform Act of 1978 (the "1978 Act") as the exclusive means for administering all bankruptcies.[1] The 1978 Act was not just an amendatory act, but was a unified recodification of the entire corpus of existing bankruptcy law, dependent upon those unconstitutional bankruptcy courts for

[1] This Court in *Northern Pipeline* held that the untenured bankruptcy courts created by the 1978 Act can not constitutionally exercise the powers and jurisdiction granted them under than Act, at least with respect to state-created claims. This Court also held that the jurisdictional grant to the bankruptcy courts by the 1978 Act was intended to be, and is, inseverable. See footnote 2, *post*. Thus the effect of *Northern Pipeline* is that the grant of jurisdiction to the bankruptcy courts under the 1978 Act is invalid in its entirety.

its administration. Although it made few substantive changes, the 1978 Act was an integrated enactment which cannot be administered apart from its new (and unconstitutional) bankruptcy courts.

Thus, absent Congressional action, upon release of the mandate in *Northern Pipeline* no mechanism will exist to administer the provisions of the 1978 Act; under that Act, the district courts are specifically disempowered from administering bankruptcies, and after *Northern Pipeline* the new bankruptcy courts lack jurisdiction to do so. For the millions of debtors and creditors involved in pending or future bankruptcies, relief under the 1978 Act will therefore become impossible. Lacking an alternative source of relief, debtors and creditors alike will be faced with huge burdens and losses which are immediate, harsh, and incalculable. Companies unable to reorganize will fire workers rather than continue their unprofitable employment. Economic chaos on a vast scale will ensue. Legal confusion will multiply existing burdens on the already over-taxed lower courts.

Petitioners contend that an alternative to this disruption and loss does exist, and that it may be implemented in this case. The bankruptcy system can continue to function, in the absence of Congressional action and after release of this Court's mandate in *Northern Pipeline*, because the fall of the 1978 Act in its entirety permits revival of the (then) ineffectively repealed prior Bankruptcy Act of 1898, as amended. The present "bankruptcy judges," previously appointed as referees under the prior Act, then become empowered to administer bankruptcies under the terms of the prior Act. Further congressional action is unnecessary to avoid loss and disruption and to permit the effective administration of bankruptcies, and release of this Court's mandate in *Northern Pipeline* can occur without harmful effect to the public.

The public interest requires that this Court address this question immediately. If not resolved now, this problem will confound the administration of each and every bankruptcy petition filed or still pending after release of the *Northern Pipeline* mandate. If not resolved now, the purpose and effect of the bankruptcy laws — to preserve by prompt action values and assets for creditors while providing debtors relief from otherwise costly and debilitating suits — will be destroyed. If not resolved now, these costs will begin immediately, and they will be irremediable. But it is unnecessary to so abandon this nation's creditors and debtors.

Petitioners believe the present case presents an appropriate means — perhaps the only appropriate means — for the prompt and effective resolution of these urgent and unavoidable issues. The fact the *Northern Pipeline* judgment was prospective and the mandate stayed does not diminish, but sharpens, the timeliness and ripeness hereof.

Proceedings Below

These proceedings were initiated in the "Bankruptcy Court" for the Eastern District of Tennessee in April, 1981 by the debtor, Ulysses Rivers, Jr., who filed a Petition and Plan under Chapter 13 of the Bankruptcy Reform Act of 1978 (the "1978 Act"). Alabama Furniture has a purchase money security interest in various household goods purchased from it by Rivers. The debtor's plan, designed under the 1978 Act, proposes to extinguish outright almost half of Alabama Furniture's secured claim and to defer payments on the remainder over a period of years.

Upon Alabama Furniture's motion, the "Bankruptcy Court" on April 14, 1982 held that the "bankruptcy courts" created by the Act are unconstitutional in violation of Article III of the U.S. Constitution. Alabama Furniture further argued that this result causes the revival of the 1898 Bankruptcy Act, as amended, and that the bankruptcy judge (referee) continues to have power to

adjudicate this case but only pursuant to the provisions of that Act. The bankruptcy court held to the contrary, however, and ordered that the entire case be dismissed. Alabama Furniture Co.'s motion to modify the order of dismissal to permit the case to proceed under Chapter XIII of the Bankruptcy Act of 1898, as amended, was denied. Under 28 U.S.C. § 1293(b), notices of appeal were filed directly with the Court of Appeals for the Sixth Circuit by Alabama Furniture from the order of dismissal and the order denying modification of the stay and by the trustee from the order of dismissal. The appeals are presently consolidated on the docket of that Court, which has deferred briefing pending resolution of this petition.

Thus the issue squarely presented is the effective law on remand after release of the stay of mandate in *Northern Pipeline*.

REASONS FOR GRANTING THE WRIT

1. The public interest in a functional bankruptcy system requires immediate resolution of the issues presented in this case.

Certiorari should be granted here in order to resolve the crucial question — of enormous practical importance to millions of Americans, debtor and creditor alike — of whether or how our bankruptcy system will function in the absence of congressional action to repair the major constitutional deficiencies in the 1978 Act exposed by this Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S.Ct. 2858 (1982) (mandate stayed until December 24, 1982). The present case presents the question whether, after release of the *Northern Pipeline* mandate and without action by Congress, this case should be attempted to be administered under the provisions of the 1978 Act, should be dismissed entirely, or should be administered under the prior Bankruptcy Act of 1898, as amended. It thus affords a unique opportunity to avoid widespread impending

harms and to indicate which, if any, procedures apply for the disposition of bankruptcy cases after December 24, 1982 (or any further stay date), whether or not this Court agrees with petitioner's ultimate position herein.

On June 28, 1982, this Court decided in *Northern Pipeline* that the untenured judiciary created by Congress in order to staff the powerful new bankruptcy "courts" could not constitutionally exercise the jurisdiction and powers given them with respect to state-created claims because such exercise would violate the constraints imposed by Article III of the Constitution. Furthermore, this Court recognized that the congressional scheme embodied in the 1978 Act, with its insistence on a single, unitary court for the resolution of all bankruptcy and "related" matters, is completely inconsistent with a piecemeal approach to bankruptcy jurisdiction, and consequently this Court held that the grant of jurisdiction vested in the bankruptcy "courts" by the 1978 Act is inseverable, and thus invalid in its entirety under the 1978 enactment.[2] Thus upon release of the stay of mandate in *Northern*

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[2] Justice Brennan, writing for the *Northern Pipeline* plurality of four, stated that:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes See H.R. Rep. No. 95-595, *supra*, p. 43-48; S. Rep. No. 95-989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 2, that
>
> (footnote continues)

Pipeline, and absent curative action by Congress, the bankruptcy courts — through which the 1978 Act was structured to be exclusively administered — will lack any jurisdiction whatsoever and can not function.

Because a retroactive application of the holding would have visited substantial hardship upon litigants who had relied upon the Act, the decision was given prospective effect only.[3] Moreover, the judgment was stayed until October 4, 1982 (and that stay subsequently extended until December 24, 1982) in order to facilitate the administration of the bankruptcy laws while Congress had the opportunity to devise a constitutional court system. The issue presented in this case, and not resolved in *Northern Pipeline*, is whether, upon expiration of the stay of mandate, the 1978 Act, absent the provisions by which it was intended and designed to be exclusively administered, can be so administered. The alternatives are twofold; first, that all bankruptcies cease, or second, as Alabama Furniture contends, that the prior Act revives to allow the administration of bankruptcies to continue. In any event,

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> Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We thank that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

102 S.Ct. at 2880, n. 40.

Justice Rehnquist, in an opinion in which Justice O'Connor concurred, indicated that

> Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see *ante*, at 37 n. 40, I concur in the Judgment.

102 S.Ct. at 2882.

[3] The prospective application of *Northern Pipeline* does not deprive the petitioners of relief in these proceedings, because the question here is the applicable law on remand after release of the mandate in *Northern Pipeline*.

absent prompt resolution of this issue by this Court, the effect on the public and on debtors, creditors and the country's court systems will be extreme.

Consequently, in the absence of appropriate curative legislation, it is of the greatest public importance that this Court address this problem immediately.

2. Because the 1978 Bankruptcy Act is an integrated enactment and cannot be administered apart from its unconstitutional court provisions, the 1978 Act as a whole falls and the prior Bankruptcy Act revives to govern bankruptcies until further action by Congress.

Petitioner respectfully submits that the 1978 Act was set up to be exclusively administered by its unconstitutional bankruptcy court system, and that it was intended *not* to be administered and can *not* properly be administered by the district courts of the United States. Until Congress can enact a new and constitutional bankruptcy law, the prior bankruptcy law revives, because repeal of a prior law is ineffective if the repeal is part of a substitute enactment which is itself ineffective. The Bankruptcy Act of 1898 (as amended), was in fact continued in effect by the 1978 Act for all then pending cases — at last count almost one-fifth of all present pending bankruptcy cases. Revival of the prior Act for the remaining cases allows the continued functioning of the bankruptcy system by the existing cadre of referees (judges) under a set of known and broadly similar rules and provisions, without endless litigation and consequent harmful delays in bankruptcy administration, and without burdening the district court judges. Revival can be prospective only, so parties in pending cases who relied upon existing law will not be injured and decided matters remain as decided.

The Bankruptcy Reform Act of 1978 was designed and structured to be an integrated enactment with the new bankruptcy "courts" its indispensible centerpiece. As Congressman Rodino, chairman of the House Judiciary Committee responsible for

reporting out the bill, stated, "the most significant portion of the bill concerns the way bankruptcy cases are handled." 123 Cong. Rec. H 11,697. Congressman Edwards, chairman of the Subcommittee on Civil and Constitutional Rights and prime author of the bill, remarked that "the new court system . . . is at the heart of the bill." *Id.* at H 11,699. Congressman Butler, the ranking minority member of the subcommittee, stated that: "This bill serves no purpose whatsoever if the independence of the bankruptcy courts is removed." *Id.* at H 11,703.

This history, considered together with the absence of any severability clause, suggests that Congress intended the 1978 Act as a whole to stand or fall with its court provisions. Examination of the structure and interrelationships of the 1978 Act makes this conclusion clear. It is of course settled that the practical difficulty of applying remaining portions of partially invalid statutes indicates that the entire act should fall. *United States v. Jackson*, 390 U.S. 570, 585, 88 S.Ct. 1209 (1968); *compare Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U.S. 419, 434-35, 58 S.Ct. 678 (1938).

After release of the *Northern Pipeline* mandate, and in the absence of congressional action, the only constitutional courts available to administer the 1978 Act are the United States district courts. But examination of the 1978 Act reveals that there are numerous obstacles to any judicial attempt to transfer bankruptcy administration under the provisions of the 1978 Act to the district courts. For example, the 1978 Act grants *exclusive* jurisdiction over all property of the debtor, "wherever located," to the bankruptcy courts alone. 28 U.S.C. § 1471(e). This provision carried out Congress' intention that the district courts not administer bankruptcies under the 1978 Act. See 1 *Collier on Bankruptcy*, ¶3.01 (15th ed. 1980). Consequently, absent an "artful" construction of the statute, the district courts would be powerless to acquire jurisdiction over the property of the estate. Acquisition

of such power is a *sine qua non* of effective bankruptcy administration; without it the court cannot protect the debtor's property from creditors.

At the most mechanical level, moreover, the 1978 Act requires that a bankruptcy case be initiated by the filing of an appropriate petition "with the bankruptcy court." 11 U.S.C. §§ 301-304. This filing defines the estate to be administered and triggers the automatic stay. 11 U.S.C §§ 362-363. In the face of Congress' repeatedly expressed intent in the 1978 Act to remove bankruptcy under that Act from the domain of the district courts, it is difficult to see how these sections could be construed to permit filings with the district court.

Nor could the district courts avoid the crushing burden of the over half million bankruptcy cases, in addition to their present record dockets, by employing the current corps of bankruptcy "judges" to administer bankruptcy cases under the 1978 Act. Unless the 1978 Act falls and the prior Act revives, these referees or "judges" lack power to act. The 1978 Act repealed their prior powers along with the rest of the prior Act, except as to proceedings commenced prior to October 1, 1979. Pub. L. No 95-598, Title IV (Transition) §§ 401, 403(a), 404(d). And of course exercise of their powers and jurisdiction under the 1978 Act was precisely what was held unconstitutional or otherwise invalid in *Northern Pipeline*. Neither can the existing referees or "judges" be effectively designated as magistrates or masters under existing provisions, since the qualifications and powers of these are too limited to bridge the gap. *See* Fed.R.Civ.P. 53; 28 U.S.C. §§ 631-37.

It is not the job of the federal judiciary to patch and reconstruct Congressional legislation such as the 1978 Act. Indeed, such efforts would endanger the fundamental separation of powers. *Cf. Buckley v. Valeo,* 424 U.S. 1, 120-23, 96 S.Ct. 612

(1976). Nor is it appropriate to enforce only part of an integrated statute such as the 1978 Act when the result "would be to create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon,* 413 U.S. 825, 834, 93 S.Ct. 2982 (1973) (rejecting partial enforcement of a Pennsylvania tuition reimbursement statute, despite the presence of a severability clause).

While the Bankruptcy Reform Act of 1978 must fall because it is a unitary scheme that cannot be administered (and was not intended to be administered) apart from its judicial provisions, this result does not deprive our country of a national bankruptcy law. A basic rule of statutory construction provides that the prior law, the Bankruptcy Act of 1898, as amended, ineffectively repealed and supplanted by the 1978 Act, will revive to fill the vacuum until Congress is able to agree upon a new and constitutional bankruptcy law. *Frost v. Corporation Comm'n,* 278 U.S. 515, 526, 49 S.Ct. 235 (1929); *Wessinger v. Boswell,* 330 F.Supp. 615 (M.D. Ala. 1971); *State v. Rondeau,* 89 N.M. 408, 553 P.2d 688 (1976); *Fiorito v. Jones,* 39 Ill.2d 531, 236 N.E.2d 698 (1968); 1A Sutherland, *Statutes and Statutory Construction* § 23.24 (4th ed. 1972). As stated in *State v. Rondeau, supra,* in which the New Mexico Supreme Court held that the unconstitutionality of a death penalty statute revived its repealed predecessor, "During the interim between the declaration of the statute's unconstitutionality and a new enactment by the Legislature which meets constitutional standards, the former statute is revived and becomes effective without any formal act by the Legislature, absent a contrary legislative intent." 553 P.2d at 692-93.

Consequently, this case on remand, and all future cases, should be governed by the Bankruptcy Act of 1898, as amended, until further direction from Congress.

Revival of the prior Act will allow a continuity of administration for all bankruptcy cases by the existing cadre of referees under rules and procedures broadly similar to those of the 1978 Act.

The result will be a bankruptcy system that can function smoothly until Congress prepares, and agrees upon, new legislation. The alternative is unnecessary and widespread economic chaos and dislocation.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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